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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1946

No. 519

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC. (a corporation),
*Petitioner,*

vs.

PAUL A. PORTER, Administrator of Office of Price Administration,
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI**
**to the United States Circuit Court of Appeals**
**for the Ninth Circuit**
**and**
**BRIEF IN SUPPORT THEREOF.**

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## Subject Index


| | Page |
|---|---|
| Petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit | 1 |
| Summary statement of matter involved | 2 |
| Jurisdictional statement | 3 |
| Questions presented | 7 |
| Reasons relied upon for issuance of the writ | 7 |
| Brief in support of petition for writ of certiorari | 11 |
| Court of Appeals decision | 11 |
| Jurisdiction | 11 |
| Statement of case | 12 |
| Specification of Errors | 12 |
| Argument | 12 |
| Summary of argument | 12 |
| A. The phrase "Industrial, Commercial or Governmental" in Section 1390.2 (f) of MPR 136 plainly excludes the agricultural | 13 |
| B. The administrator used the phrase "Industrial, Commercial, or Governmental" with full knowledge of its settled meaning and with the intention that such was to be its construction | 16 |
| C. The interpretations of the administrator relied upon by the Circuit Court are inadmissible to vary the plain language of the regulation. A status created by regulation may be changed only by regulation and not by an "interpretation" | 19 |
| Conclusion | 22 |

## Table of Authorities Cited

### Cases


| | Pages |
|---|---|
| Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 | 6, 8, 20 |
| Bowles v. Trullinger, 152 F. (2d) 191 | 16 |
| F. Urie & Co. v. Bowles (C.C.A. 9th), 152 F. (2d) 713 | 6, 21 |
| In re Yakima Fruit Growers (Supreme Court of Washington), 146 P. (2d) 800 | 15 |
| Marks Co. v. United States, 12 Ct. Customs App. 110 | 15 |
| Schreffler v. Bowles (C.C.A. 10th), 153 F. (2d) 1 | 15 |
| Speten v. Bowles, 146 F. (2d) 602 | 16 |
| State ex rel. Kansas City Power & Light Co. v. Smith (Supreme Court of Missouri, 1938), 111 S. W. (2d) 513 | 8, 14, 17 |
| Terrace v. Thompson, 263 U. S. 197 | 6, 8, 13, 17 |
| U. S. v. Public Service Co. (C.C.A. 10th), 143 F. (2d) 79 | 8, 14 |


### Statutes


| | |
|---|---|
| Emergency Price Control Act of 1942: | |
| 50 U.S.C. Sections 205(a) and 205(e), 56 Stat. 23 | 3 |
| Section 205(c) | 3 |
| Judicial Code: | |
| Section 128 | 3 |
| Section 129 | 3 |
| Section 240 | 3 |
| 28 U.S.C. Section 225 | 3 |
| 28 U.S.C. Section 227 | 3 |
| 28 U.S.C. Section 347 | 3 |
| 50 U.S.C. App. Section 902 | 21 |


### Other Authorities


| | |
|---|---|
| Maximum Price Regulation, No. 136: | |
| (7 Fed. Reg. 3198) | 2, 3, 6, 7, 8, 14, 17, 18, 19, 20, 22 |
| Amendment 96 (8 Fed. Reg. 10662) | 4, 7, 16, 17, 18 |
| Section 1390.2 | 4, 19 |
| Section 1390.2 (f) | 4, 6, 12, 13, 16, 17, 18, 20 |
| Section 1390.2 (i) | 20 |
| Metal and Machinery Desk Book, page 60:403 | 5, 20 |
| 8 O.P.A. Service, p. 40:2018 | 5, 19 |

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**PETITION FOR WRIT OF CERTIORARI**
**to the United States Circuit Court of Appeals**
**for the Ninth Circuit.**

*To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

Your petitioner, Mechanical Farm Equipment Distributors, Inc., respectfully shows:

## SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner is a dealer in farm machinery in the City of San Jose, California. Between the dates August 1, 1943, and September 25, 1943, petitioner sold certain used crawler type tractors to farmers for agricultural use by them on their farms and orchards. (R. 11.) The amended complaint charged that these sales were made at prices in excess of the maximum prices permitted under Maximum Price Regulation, No. 136 (7 Fed. Reg. 3198) (hereinafter referred to as MPR 136) and asked for damages of $17,656.11 and an injunction. (R. 2-5.) Petitioner plead as a defense (R. 10) and contended on the trial and appeal that the sales of crawler tractors to farmers did not come within the purview of MPR 136 since they were sales at retail and, as such, expressly excluded by the order from its operation. The District Court entered judgment against petititoner in the sum of $4,469.29 damages and an injunction. The sum of $3,733.96 was awarded by reason of the sales of crawler tractors to farmers. (R. 11; R. 16-22.) The Circuit Court of Appeals for the Ninth Circuit affirmed this judgment. The purpose of this petition is to obtain a review of the holding of the Circuit Court that sales of crawler tractors to farmers for agricultural use were subject to the provisions of MPR 136.

**JURISDICTIONAL STATEMENT.**

This action arises under the Emergency Price Control Act of 1942 (50 U.S.C. Sections 205(a) and 205(e), 56 Stat. 23) and Maximum Price Regulation No. 136 (7 Fed. Reg. 3198). Jurisdiction of the District Court was invoked under Section 205(c) of the Act. Jurisdiction of the Circuit Court of Appeals was invoked under Sections 128 and 129 of the Judicial Code. (28 U.S.C. Sec. 225 and 227.) Jurisdiction of this Court is invoked under Section 240 of the Judicial Code. (28 U.S.C. Sec. 347.)

Judgment was entered by the District Court on August 23, 1945. (R. 15-16.) The Circuit Court of Appeals for the Ninth Circuit entered judgment affirming the judgment of the District Court on June 24, 1946 (R. 110), and became final on that date.

MPR 136 in its pertinent portions provides:

"*Sec. 1390.1.* Definition of 'Machines and Parts' and 'Machinery services'. For the purpose of this regulation:

(a) The term 'machines and parts' means, and is limited to, products falling within the groups listed in Appendix A and Appendix B. Any other product is subject to the General Maximum Price Regulation, unless excluded therefrom or unless subject to some other specific regulation. * * *"

"*Sec. 1390.32.* Appendix A: Machines and parts to which the October 1, 1941, date is applicable * * * (d) Construction and mining machinery, etc. * * * crawler and non-agricultural tractors."

Prior to July 29, 1943, Section 1390.2 of MPR 136 read in part as follows:

> "This regulation shall not apply to: * * * (f) Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof. For the purpose of this exclusion a sale or delivery is deemed to be 'at retail' (1) when made to an ultimate consumer other than an industrial, commercial or governmental user * * *."

On July 29, 1943, the Administrator issued Amendment 96 to MPR 136 (8 Fed. Reg. 10662) which added trucks, trailers and busses to the Regulation's coverage and by which Section 1390.2(f) was also changed to read as follows:

> "(f) Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof, *except that the sale or delivery at retail of automotive trucks, and busses (as described in Section 1390.33 (c) shall not be excluded from but shall be included by this regulation.* * * * For the purposes of this exclusion a sale or delivery is deemed to be 'at retail' (1) when made to an ultimate consumer other than an industrial, commercial or governmental user * * *." (Emphasis indicates language added.)

On July 10, 1943, petitioner received by mail from the San Francisco District Office of respondent a mimeographed letter enclosing a mimeographed list of questions and answers on farm equipment prices. (R. 71; Defendant's Exhibit H, R. 58-71.) The same enclosure was sent to petitioner's competitors. (R. 73.) The bulletin advised petitioner as follows (R. 68-69):

"31. Q. What regulation governs the sales of used crawler tractors to farmers by dealers?

A. A sale of a used crawler tractor by a dealer to a farmer would be considered a sale at retail and excluded from Maximum Price Regulation 136 and is placed under the General Maximum Price Regulation."

The bulletin contained similar interpretations as to sales of new crawler tractors to farmers (R. 63) and on farmer to farmer sales of used crawler tractors. (R. 71.) Interpretations to the same effect as received by petitioner were issued by other District Offices of respondent as early as January 9, 1943. (R. 86.) No notice of any contrary position was ever given by respondent to petitioner. (R. 57.)

On November 15, 1942, the Administrator issued an interpretation dealing with the applicability of the order to repair services on tractors (8 O.P.A. Service, p. 40:2018) as follows:

"Repair Service on Tractors. The Regulation (MPR 136) is applicable to repair services on industrial and crawler tractors, even though the tractors are used for agricultural purposes."

On September 1, 1943, the Administrator issued the following interpretation (Metal and Machinery Desk Book, p. 60:403):

"Crawler type tractors sold by one farmer to another. The sale of crawler tractors by one farmer to another is subject to the regulation. Such a sale is not a sale 'at retail' except pursuant to Section 1390.2 (f), because a farmer is a com-

> mercial user. A farmer is considered a commercial user, since he operates his farm as a commercial activity and purchases the equipment for use in carrying out that activity."

This interpretation was issued after the sales involved in this case had commenced but before all were concluded. (R. 16-21.)

The Circuit Court of Appeals held that the language of Section 1390.2(f) was not clear, that the Administrator's intention with respect thereto was not shown by his Amendment 96 thereto and the extended construction thereof by his District Office subordinates and, relying entirely upon the interpretations of November 15, 1942 and September 1, 1943, determined that these latter expressions were of controlling weight and not inconsistent with his earlier interpretation or with the language of the Regulation. The decision of the Circuit Court gave an effect to the interpretation of September 1, 1943, whereby the price regulation covering sales of machinery to farmers was shifted from the General Maximum Price Regulation to MPR 136. The holding of the Circuit Court is directly contrary to its own holding in the case of *F. Urie & Co. v. Bowles* (C.C.A. 9th), 152 F. (2d) 713, is in conflict with the decision of this Court in the case of *Terrace v. Thompson,* 263 U. S. 197, and misapplies the rule of *Bowles v. Seminole Rock & Sand Co.,* 325 U. S. 410.

## QUESTIONS PRESENTED.

(1) Does not the phrase "industrial, commercial or governmental" in MPR 136 plainly exclude the agricultural under well settled rules of construction?

(2) Does not Amendment 96 to MPR 136 clearly indicate the intention of the Administrator that the phrase was to bear its settled judicial meaning?

(3) Does not the action of the Administrator in permitting interpretations to issue to the trade from his district subordinates in accordance with the settled meaning without amending the order to the contrary coupled with his amendment to the order which would have no meaning unless such settled construction were intended, deprive his interpretation to the contrary of effect?

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## REASONS RELIED UPON FOR ISSUANCE OF THE WRIT.

A judgment which holds a citizen liable in damages for violating a regulation by reason of an administrative interpretation which is in conflict with the plain language of the regulation should not be permitted to stand. There is and must be a limit beyond which interpretation must bow to language of the regulation.

The Administrator should not be judicially permitted to adopt language of settled construction, act in accordance with such construction and permit his subordinates to so advise an industry and then retroactively seek to change his stand by contrary interpretation.

The holding of the Circuit Court of Appeals misapplies the rule of *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414 and conflicts with the decisions of this and other courts, State and Federal, insofar as it holds that the phrase "industrial, commercial or governmental" does not have a plain meaning. See *Terrace v. Thompson,* 263 U. S. 197; *U. S. v. Public Service Co.* (C.C.A. 10th), 143 F. (2d) 79; *State v. Smith* (Supreme Court of Missouri), 111 S. W. (2d) 513.

The questions presented are substantial and important both to the Administrator in the exercise of his powers and to all persons whose businesses are subject to price regulation.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 11,227, Mechanical Farm Equipment Distributors, Inc., a corporation, appellant, v. Paul A. Porter, Administrator of Office of Price Administration, appellee", and that said judgment of the United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this honorable Court insofar as the same awards damages or an injunction under Maximum Price Regulation No. 136, and that your peti-

tioner may have such other and further relief in the premises as to this honorable Court may seem just.

Dated, Palo Alto, California,
September 11, 1946.

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC. (a corporation),
*Petitioner,*
By S. HASKET DERBY,
*Attorney for Petitioner.*

NATHAN C. FINCH,
*Of Counsel.*

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No.

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*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### COURT OF APPEALS DECISION.

The opinion of the Circuit Court of Appeals is reported in ..... F. 2d ..... and is set forth in the record at page 102 et seq.

### JURISDICTION.

The decision of the Circuit Court of Appeals in this case was rendered and became final on June 24, 1946.

## STATEMENT OF CASE.

A full statement of the case as set forth in the petition and in the interest of brevity will not be repeated.

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## SPECIFICATION OF ERRORS.

A full statement of the errors committed by the Circuit Court of Appeals has been set forth in the petition and will not be repeated in the brief.

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## ARGUMENT.

### SUMMARY OF ARGUMENT.

*Point A.* The phrase "industrial, commercial or governmental" in Section 1390.2 (f) of MPR 136 plainly excludes the agricultural.

*Point B.* The Administrator used the exclusionary phrase quoted with full knowledge of its settled meaning and with the intention that such was to be its construction.

*Point C.* The interpretations of the Administrator relied upon by the Circuit Court are inadmissible to vary the plain language of the Regulation. A status created by regulation may be changed only by regulation and not by an "interpretation".

## A.

### THE PHRASE "INDUSTRIAL, COMMERCIAL OR GOVERNMENTAL" IN SECTION 1390.2 (f) OF MPR 136 PLAINLY EXCLUDES THE AGRICULTURAL.

Section 1390.2 (f) of MPR 136 excluded from its operation sales made to an ultimate consumer other than an "industrial, commercial or governmental user". In a broad sense commercial includes industrial and vice versa, being synonymous with trade or business. In a narrow sense neither word includes the other and neither includes the agricultural. Where the words are used in juxtaposition, as in the phrase in Section 1390.2 (f), each word should be given a restricted meaning as mutually exclusive under the rule that the expression of one thing is the exclusion of another. The above rules are applied in the cases hereinafter cited dealing with the quoted phrase or others substantially similar.

In *Terrace v. Thompson,* 263 U.S. 197, a state statute prohibited the leasing of land to Japanese aliens for agricultural purposes. The treaty between Japan and the United States permitted Japanese to lease land "for residential and commercial purposes." In holding that the statute did not conflict with the treaty this Court said, page 223:

> "The right * * * 'to lease land for residential and commercial purposes,' or 'to do anything incident to or necessary for trade' cannot be said to include the right to own or lease or to have any title to or interest in land for agricultural purposes. *The enumeration of rights to own or lease for other specified purposes impliedly negatives*

*the right to own or lease land for these purposes."* (Italics ours.)

In *U. S. v. Public Service Co.,* 143 F. (2d) 79, a tax was imposed upon electrical energy sold "for domestic or commercial consumption and not for resale". It was held that the tax did not apply to electricity sold to dairies to use in pasteurizing milk, the Court saying, page 81:

> "The term 'commercial' may have a broad or a narrow meaning. In its broad meaning it encompasses industrial enterprises or all business. In the narrow meaning of the term 'commercial' is included only those enterprises engaged in the buying and selling of goods. The legislative history of the Act would indicate that Congress was using the word 'commercial' in the restricted rather than the broad sense."

*State ex rel. Kansas City Power & Light Co. v. Smith* (Supreme Court of Missouri 1938), 111 S.W. (2d) 513 involved a tax imposed upon sales of electricity "to domestic, commercial or industrial consumers", a phrase practically identical with that used by the Administrator in MPR 136. It was held that the tax did not apply to sales of electricity to a public service company to propel street cars or to a municipality to pump water. The Court said, page 515:

> "If 'commercial' is used in its broad sense, it included also the word 'industrial'. * * * If the word 'commercial' includes 'industrial', then why did the Legislature use the word 'industrial' also? We have already seen that every word should be

> given a meaning in construing a statute if possible; we therefore conclude that the word 'commercial' was not used by the Legislature with the intention of including the word 'industrial'. Both were used in the act, not in a broad sense, but, rather, in a restricted sense."
>
> * * * * * * *
>
> "The ordinarily accepted use of the phrase 'commercial establishment' denotes a place where commodities are exchanged, bought, or sold, while the ordinarily accepted meaning of the phrase 'industrial establishment' denotes a place of business which employs much labor and capital and is a distinct branch of trade; as, the sugar industry. Thus we see that the transportation of passengers would not come within the ordinary meaning of either the word 'commercial' or 'industrial'."

See also *Marks Co. v. United States,* 12 Ct. Customs App. 110 and *In re Yakima Fruit Growers* (Supreme Court of Washington), 146 P. (2d) 800.

The ordinary rules of construction, as applied in the above cases, should apply in this case. In *Schreffler v. Bowles* (CCA 10th), 153 F. (2d) 1, in holding the words "sell or deliver" not to be synonymous for the purpose of commencing running of the statute of limitations, the Court in upholding the Administrator's contention said, page 3:

> "It must be presumed that Congress used them according to their ordinary and usual accepted meaning. Otherwise there would have been no need to include them both in the Act."

Cases holding that farming is a "trade or business" within the meaning of the Act, authorizing suit by the Administrator such as *Speten v. Bowles,* 146 F. (2d) 602 and *Bowles v. Trullinger,* 152 F. (2d) 191, have no application to the construction of the phrase "industrial, commercial or governmental". While farming may be a trade or a business, it is not a commercial trade or business or an industrial trade or business. The choice by the Administrator of the restricted phrase, rather than the adoption of the broad language of the Act convincingly indicates that he knowingly selected the language he used.

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## B.

### THE ADMINISTRATOR USED THE PHRASE "INDUSTRIAL, COMMERCIAL, OR GOVERNMENTAL" WITH FULL KNOWLEDGE OF ITS SETTLED MEANING AND WITH THE INTENTION THAT SUCH WAS TO BE ITS CONSTRUCTION.

If the intention of the Administrator is not clearly disclosed by the language of Section 1390.2 (f) of the Regulation, his conduct during the year 1943 prior to September 1 of that year is sufficient to resolve any doubts.

By Amendment 96 to MPR 136 (8 Fed. Reg. 10662) busses and trucks were, for the first time, placed under the coverage of the Regulation. If, as the Administrator now contends, he then intended that the words "industrial" and "commercial" should each have a broad meaning including each other as well as all activity engaged in for monetary gain, it is

virtually impossible to conceive of any sale of a truck or bus which would be a retail sale as defined in Section 1390.2 (f), since trucks and busses are purchased only for business use. If, on the other hand, the Administrator intended that the words "industrial" and "commercial", as used in Section 1390.2 (f), to have a restricted meaning, it was obvious to him that under the case of *State v. Smith,* 111 S.W. (2d) 513 (supra), sales of busses to transportation companies would be retail sales excluded from the Regulation; likewise under the holding of *Terrace v. Thompson,* 263 U.S. 197, supra, that sales of trucks to farmers would not be within the Regulation. If the latter were not his construction of the phrase which he used in Section 1390.2 (f) the addition to that section by Amendment 96 of the words

> "except that the sale or delivery at retail of automotive trucks, trailers and busses * * * shall not be excluded from but shall be covered by this regulation"

is completely meaningless. It is presumed that the Administrator's words are not meaningless.

We may go further and say that if the construction of the retail exclusion clause adopted by the Circuit Court of Appeals is correct, then the clause as a whole was practically meaningless. Reference to MPR 136 shows that few, if any, of the products which it covers are capable of sale for any purpose other than in the business of the purchaser. If the holding of the Circuit Court in this case is upheld it follows that the Administrator not only wasted his time in drafting

the exclusion but also that he wasted his time in subsequently amending it, since it never excluded anything.

The District Offices of the Administrator understood that the exclusion of Section 1390.2 (f) was not meaningless. As early as January 9, 1943, they advised the industry that sales to farmers were not covered by MPR 136. (R. 86.) Petitioner and other members of the trade in Northern California were so informed as late as July, 1943 (R. 58-71), the same month Amendment 96 was promulgated and less than one month before the sales involved in this case were commenced. The conclusion of the Circuit Court that the Administrator was not estopped by the interpretations of his District subordinates ignores the point. It was, and is, petitioner's contention, not that the Administrator was estopped, but that the interpretations of the District Offices were correct and that the conduct *of the Administrator* (not his District subordinates) in permitting such interpretations to issue for such a long period of time, coupled with the plain language of Section 1390.2 (f) and his interpretation thereof necessarily implied from Amendment 96, clearly shows that the intention of the Administrator was contrary to that for which he is contending in this case.

It would seem to admit of no doubt that if the prices charged by petitioner in this case violated the General Maximum Price Regulation (which they did not) and the Administrator had never issued his interpretation of September 1, 1943, a suit by the Ad-

ministrator based upon the petitioner's contentions in this case would have been upheld by the Courts as clearly authorized by the exclusion of the sales from MPR 136, the conduct of the Administrator above mentioned and the actual interpretation received by petitioner from the District subordinates.

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C.

**THE INTERPRETATIONS OF THE ADMINISTRATOR RELIED UPON BY THE CIRCUIT COURT ARE INADMISSIBLE TO VARY THE PLAIN LANGUAGE OF THE REGULATION. A STATUS CREATED BY REGULATION MAY BE CHANGED ONLY BY REGULATION AND NOT BY AN "INTERPRETATION".**

It therefore appears that the only basis for the decision of the Circuit Court are the two interpretations of the Administrator relied upon in the opinion. Neither interpretation supports the decision.

The first interpretation, dated November 15, 1942 (8 O.P.A. Service p. 40:2018) provides:

> "The Regulation (MPR No. 136) is applicable to repair services on industrial and crawler tractors, even though the tractors are used for agricultural purposes."

This interpretation is cited by the Circuit Court for the proposition that the Administrator has consistently interpreted MPR 136 as covering sales to farmers. (R. 103-104.) The conclusion reached by the Circuit Court is erroneous and the cited interpretation is correct. MPR 136 covered both machinery sales and machinery services. Section 1390.2 of the

Regulation excludes certain sales and certain services from its operation. The exceptions dealing with machinery services are contained in Section 1390.2 (i) and cover repairs to public address systems, electric storage batteries, etc. The repair of tractors is not excepted and is therefore included. The exclusion involved in this case involves retail *sales* as specified in Section 1390.2 (f). We submit that the interpretation on repairs furnishes no clue to the Administrator's intent as to sales.

This leaves the judgment with but one basis for support, the interpretation of September 1, 1943, found in Metal and Machinery Desk Book, 60:403. That interpretation purports to rule that the sale of a crawler tractor to a farmer is not a sale at retail "because a farmer is a commercial user". If the interpretation is of "controlling weight" under the holding in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, it sustains the judgment. It should not be given such weight. The last cited case upholds only those interpretations which are not "plainly erroneous or inconsistent with the regulation," both of which tests are violated by the interpretation in question. This interpretation was not issued concurrently with the Regulation but at a far later date and after interpretations to the contrary had been given and action inconsistent therewith had been taken.

The effect of the interpretation of September 1, 1943, if valid, would be to retroactively change the regulation covering sales to farmers from the General Maximum Price Regulation to MPR 136. Such a change may be accomplished only by a regulation and

not by an interpretation (50 U.S.C. App. Sec. 902). The case of *F. Uri & Co. v. Bowles* (CCA 9th), 152 F. (2d) 713, expressly so holds, the Court saying:

> "But the problem here presented differs in a material aspect from the particular issue faced by the Court in the Seminole case. A reading of that case indicates that there both the regulations *and* the 'administrative construction' thereof were issued by the administrator concurrently. This is not the situation confronting us in this case. At the time of the alleged violation of the regulations (August 3, 1943) the administrative constructions relied on and strongly emphasized by appellee had not been promulgated by the Administrator. Appellants confronted *only* the regulations and the Statement of Considerations in the issuance of Amendment 12 * * * not the regulations and these later administrative constructions." (p. 715.)
>
> * * * * * * *
>
> "The Price Administrator is empowered to alter a status created by a prior regulation only by an order or another regulation (50 U.S.C.A. Appendix Sec. 902). * * * If the attempted interpretation of October 20, be regarded as a true interpretation of Amendment 12 it would have to relate back to May 26, 1943.

The gross injustice of such a later contradictory interpretation to merchants relying upon the Price Administrator's interpretation of May 26, given at the time of promulgation of Amendment 12, is equally obvious. It makes the Price Administrator say, in effect, that on May 26 these business concerns acquired a certain status by virtue of his interpretation, but on October 20, by a different interpretation they did not acquire

> it. * * * The Price Administrator's attempt failed because he can make such a change only by order or regulation." (pp. 718, 719.)

In this case two of the sales upon which the judgment is based were made in the month of August, 1943 and *before the interpretation of September 1, 1943 was issued.* (R. 18, sales to Antichi and Van Horn.) The only difference between the case last cited and the case at bar is that the prior interpretation there was express and in this case, if not express, it is necessarily implied. The distinction is without a difference. The decision of the Circuit Court in the case at bar is in square conflict with the same Court's holding in the case last cited.

---

**CONCLUSION.**

It is respectfully submitted that the judgment of the Circuit Court of Appeals has sanctioned a departure from the plain meaning of MPR 136 in a matter of importance to petitioner and others in the business of selling farm machinery and that it should be reversed.

Dated, Palo Alto, California,
September 11, 1946.

Respectfully submitted,
S. HASKET DERBY,
*Attorney for Petitioner.*

NATHAN C. FINCH,
*Of Counsel.*